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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR83 (No 2)

Appellant

and

THE PRIME MINISTER

Respondent

Ms Macdonald QC with Mr McGowan (instructed by Harte Coyle Collins Solicitors) for the Appellant
Dr McGleenan QC and M McAteer (instructed by Crown Solicitor) for the Respondent

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Before: Morgan LCJ, Treacy LJ and O'Hara J

MORGAN LCJ (delivering the judgment of the court)

[1] On 30 October 2020 the appellant applied for leave to issue judicial review proceedings seeking a declaration that the decision of the Prime Minister on 24 January 2020 to sign the "Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" ("the withdrawal agreement"), including the Protocol on Ireland/Northern Ireland ("the Protocol") was unlawful in that he did not intend that the UK Government would be bound by or adhere to or otherwise fully implement that agreement.

[2] McAlinden J refused the application for leave on the basis that he did not consider that the mind-set of the Prime Minister when signing the withdrawal agreement was a matter that the court could or should examine. The appellant renews her application on the basis that the decision of the Prime Minister frustrated

the will of Parliament and that it was unlawful for the Prime Minister to sign the withdrawal agreement if he did not intend to adhere to and fully implement it. By a Respondent's Notice the respondent submits that the application for leave to apply for judicial review should have been refused on the basis that the application was academic, that there was delay in bringing the proceedings and that the application was unarguable generally on the evidence and arguments before the learned trial judge.

Statutory Background

[3] On 26 June 2018 the EU (Withdrawal) Act 2018 ("the 2018 Act") was enacted. The purpose of the Act was to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU. Section 13 of the 2018 Act provided for Parliamentary approval of the outcome of negotiations with the EU on a withdrawal agreement.

[4] On 24 July 2019 the Rt Hon Boris Johnson MP assumed office as Prime Minister. On 17 October 2019 a withdrawal agreement (including a revised Ireland/Northern Ireland protocol) and Political Declaration were agreed at a meeting of the European Council between the EU and the UK Government. The Conservative party led by Mr Johnson won a substantial victory in the general election of December 2019 on the basis of a manifesto promise to implement the withdrawal agreement.

[5] On 23 January 2020 Parliament enacted the EU (Withdrawal Agreement) Act 2020 ("the EUWAA"). Section 5 of the EUWAA provided for general implementation of the withdrawal agreement in domestic law and inserted a new section 7A into the 2018 Act:

> "**7A General implementation of remainder of withdrawal agreement**
>
> (1) Subsection (2) applies to—
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
>
> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly.

(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."

[6] Sections 21 and 22 of the EUWAA inserted section 8C into the 2018 Act giving power to Ministers and devolved authorities to make regulations providing for the implementation of the Protocol, to supplement the effect of section 7A and otherwise to deal with matters arising out of or related to the Protocol. Section 24 of the EUWAA enhanced the protection of the arrangements for North-South cooperation as provided for by the Belfast Agreement by amending section 10 of the 2018 Act which itself provided for the continuation of North-South cooperation and the prevention of new border arrangements.

[7] Section 20 of the Constitutional Reform and Governance Act 2010 provides for treaties to be laid before Parliament before ratification. Section 32 of the EUWAA provided that section 20 did not apply in relation to the withdrawal agreement. That enabled the Prime Minister to ratify the treaty by signing it on 24 January 2020. It is that act which is the subject of the challenge.

The Appellant

[8] The appellant is a 62 year old grandmother who lives in Northern Ireland near the border with the Republic of Ireland. She is concerned about the consequences of a hard border between Northern Ireland and the Republic of Ireland. She has expressed her concern that the Prime Minister and the UK Government never intended to be bound by law to implement the withdrawal agreement in full. She fears that the Prime Minister signed these agreements in order to ensure a speedy UK departure from the EU without intending to be bound by them or to implement them.

[9] She explained in her affidavit that much of her private life involves crossing the border between Northern Ireland and the Republic of Ireland. She also refers to statements by senior members of the PSNI indicating that the uncertainty around the potential for the creation of a hard border was detrimental to peace. Her sister, who was 14 years old at the time, was shot dead by the British Army in September 1971 so she has been personally affected by events during the troubles.

[10] The appellant's solicitor, Ms Coyle, has set out the rather tortuous process leading to the making of the withdrawal agreement in October 2019 and the passing of the EUWAA on 23 January 2020. She contends that recent developments make it clear that the Government never intended to be bound by the withdrawal agreement. She puts forward the following matters in support of that proposition:

(a) On 7 November 2019 the Prime Minister was filmed informing a group of Conservative party members that an employer could tell his staff that after the UK departure from the EU they would not be required to fill in any customs declarations for goods leaving NI to GB. Article 5(3) of the Protocol requires the making of an exit summary declaration in such circumstances. Ms Coyle suggests that either the Prime Minister did not understand the deal he had signed, he was not answering truthfully or he never intended to implement the agreement even if it was ratified.

(b) On 22 September 2020 the government introduced the Internal Markets Bill which proposed unilateral modifications to export declarations and other exit procedures and power to deviate from the state aid provisions contained within the Protocol. The Secretary of State for Northern Ireland in introducing the Bill indicated that it would breach international law. The Protocol contains mechanisms for the resolution of difficulties between the parties but no attempt was made to utilise those mechanisms in relation to these issues. These portions of the Bill were subsequently withdrawn.

(c) The BBC reported in relation to the withdrawal agreement and the government's decision to introduce legislation conflicting with it that the Prime Minister's spokesman said the withdrawal agreement had been agreed at pace in the most challenging possible political circumstances to deliver on a decision by the British people. The appellant contends that this supports the proposition that the withdrawal agreement was ratified by the Prime Minister in order to achieve Brexit quickly in circumstances where he believed that he would not be bound by the agreement and could avoid implementing it once the UK was out of the EU. A recent Daily Telegraph report suggested that the Prime Minister considered that the withdrawal agreement and the Protocol never made sense.

(d) The appellant relied on statements by Mr Bernard Jenkin MP stating that there was an assurance by the government that it would interpret the withdrawal agreement themselves and that this had always been the intention of the Prime Minister.

(e) A Sunday Times Report on 23 February 2020 shortly after the ratification of the withdrawal agreement suggested that work was going on within Government about evading Irish Sea checks on goods and not complying with the Northern Ireland Protocol. The report went on to claim that the Attorney General, Geoffrey Cox, submitted his resignation at the request of

the Prime Minister as he was not prepared to countenance action that would be seen as a breach of the withdrawal agreement.

(f) On 17 September 2020 the Prime Minister published a policy paper entitled "Government Statement on the Notwithstanding Clauses." This referred to the Internal Markets Bill and suggested that similar provisions could be made where in the view of the government the EU was engaged in a material breach of its duties of good faith or other obligations and thereby undermining the fundamental purpose of the Northern Ireland protocol. That stance was later withdrawn.

(g) Ms Coyle also relied on some remarks by Dominic Cummings about the deal negotiated by Theresa May MP where he indicated that the commitments made in that arrangement were not binding.

[11] Pre-action correspondence was sent on behalf of the appellant on 17 September 2020 setting out these complaints but the reply did not engage with any of the specific issues.

[12] It was submitted on behalf of the Prime Minister that the most obviously relevant, unambiguous and objectively reliable evidence available to the court was that the EU/UK Joint Committee, the body tasked with ironing out issues arising in respect of the Protocol, agreed on 8 December 2020 on the outstanding issues relating to the implementation of the Protocol as reflected in the terms upon which the UK Internal Market Act 2020 was ultimately enacted. Shortly following the agreement in the Joint Committee the UK and EU announced on 24 December 2020 that they had agreed a new Trade and Cooperation Agreement which was signed on 30 December 2020 by the Prime Minister following the passing of the EU (Future Relationship) Act 2020.

[13] On 24 February 2021 the European Union and the United Kingdom held the first meeting of the Joint Committee following the end of the transition period. The parties noted the progress that had been made and acknowledged the importance of joint action to make the Protocol work for the benefit of everyone in Northern Ireland. The EU and UK reiterated their full commitment to the Good Friday (Belfast) Agreement in all its dimensions, and to the proper implementation of the Protocol.

[14] In answer to those submissions a further affidavit from Ms Coyle noted that on 3 March 2021 the UK Government unilaterally put in place grace periods in relation to authorised traders such as supermarkets and trusted suppliers to move goods without the need for official certification and similar arrangements were put in place in respect of agricultural and forestry machinery and growing media when moved from GB to NI.

[15] It was submitted that the failure to discuss these matters in the Joint Committee supported the conclusion that the UK government was taking positive steps to depart from the requirements of the Protocol and was also failing to operate the mechanisms established by it. As a result of the actions of the UK government the EU Commission initiated a formal infringement process against the United Kingdom. That process has recently been stayed pending further discussions between the EU and the UK.

The Arguments

[16] The judicial review proceedings were not lodged until 30 October 2020 more than nine months after the signing of the withdrawal agreement by the Prime Minister. In submissions lodged on 23 February 2021 the appellant explained that the trigger for the issue of the proceedings was not just the production of the United Kingdom Internal Markets Bill ("the Bill") but also statements made some days prior to the introduction of the Bill and associated media reporting together with Government policy published following the introduction of the Bill indicating contemplation of further similar statutory measures.

[17] The appellant submitted that in light of those developments the previous statements and media reporting upon which she relied should be seen in a new light. The appellant argued that these matters supported the conclusion that the Prime Minister signed the withdrawal agreement, including the Protocol, without intending to be bound by, adhere to or implement it. Since Parliament intended that the agreement should be honoured it was contended that the Prime Minister had acted in a way which frustrated the will of Parliament.

[18] It was also contended that since Parliament was denied the opportunity of considering and ratifying the terms on which the Prime Minister did intend the UK to leave the EU he had prevented democratic scrutiny and accountability. Lastly, it was contended that signing the withdrawal agreement without intending to be bound by it was an abuse of public power and a deceit on Parliament. That constituted an act of bad faith. For all of these reasons the Prime Minister had acted outside the limits of the prerogative power and the matter was justiciable.

[19] The respondent did not introduce any material to expressly contradict the reports and statements put forward by the appellant but submitted that these were quite insufficient to suggest that the Prime Minister had signed a withdrawal agreement for an improper purpose or in order to frustrate the will of Parliament. It was submitted that the United Kingdom exited the transition period on 31 December 2020 in a manner entirely consistent with the terms of the withdrawal agreement and with the full implementation of the Protocol.

[20] This was an impermissible challenge to the introduction of the Bill which was prohibited by Article 9 of the Bill of Rights 1689 which precludes the courts questioning the lawfulness of proceedings in Parliament. The respondent contended

that the exercise of the prerogative power in this case was well within the limits of the power and in this case the appellant sought to challenge the substance of inherently political decisions about the manner in which negotiations with the EU about the terms of exit were conducted.

[21] The appellant's challenge proceeded on the basis that she wished to see the implementation of the withdrawal agreement. The signing of the agreement secured that outcome. The issue was now academic. There had been undue delay which in itself was sufficient to defeat the application.

Consideration

[22] The enactment of the EUWAA on 23 January 2020 implemented and made other provision in domestic law in connection with the withdrawal agreement which set out the arrangements for the United Kingdom's withdrawal from the EU. Those provisions of domestic law were binding on the Prime Minister and the UK Government unless amended or repealed by further legislation. Any suggestion in the appellant's submissions that the Prime Minister had authority to act in contravention of the Protocol in a manner prohibited by domestic law without any legal consequence is unfounded.

[23] In order to be effective the withdrawal agreement had to be ratified by all parties and that was effected on 24 January 2020. Section 25(3) of the Constitutional Reform and Governance Act 2010 ("the 2010 Act") provides that ratification of a treaty is a reference to an act which establishes as a matter of international law the United Kingdom's consent to be bound by the treaty.

[24] It follows that the act of ratification of the treaty had no effect in domestic law (see the discussion in R (and the application of SC and others) v Secretary Of State for Work and Pensions [2021] UKSC 26 at paras 74 – 96). In particular it did not give rights in domestic law to interpret and enforce its terms. Domestic law rights in respect of the Protocol were, however, established by the EUWAA.

[25] The justiciability of prerogative powers was considered by the Supreme Court in R (Miller) v Prime Minister and Others [2020] AC 373 at paras 35-37:

> "[35] Having made those introductory points, we turn to the question whether the issue raised by these appeals is justiciable. How is that question to be answered? In the case of prerogative powers, it is necessary to distinguish between two different issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The first of these issues undoubtedly lies

within the jurisdiction of the courts and is justiciable, as all the parties to these proceedings accept. If authority is required, it can be found in the decision of the House of Lords in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The second of these issues, on the other hand, may raise questions of justiciability. The question then is not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In the *Council of Civil Service Unions* case, the House of Lords concluded that the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised. In that regard, Lord Roskill mentioned at p 418 the dissolution of Parliament as one of a number of powers whose exercise was in his view non-justiciable.

[36] Counsel for the Prime Minister rely on that dictum in the present case, since the dissolution of Parliament under the prerogative, as was possible until the enactment of the Fixed-term Parliaments Act 2011, is in their submission analogous to prorogation. They submit that prorogation is in any event another example of what Lord Roskill described as "excluded categories", and refer to later authority which treated questions of "high policy" as forming another such category (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett* [1989] QB 811, 820). The court has heard careful and detailed submissions on this area of the law, and has been referred to many authorities. It is, however, important to understand that this argument only arises if the issue in these proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits, rather than as one concerning the lawful limits of the power and whether they have been exceeded. As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them.

> [37] Before reaching a conclusion as to justiciability, the court therefore has to determine whether the present case requires it to determine where a legal limit lies in relation to the power to prorogue Parliament, and whether the Prime Minister's advice trespassed beyond that limit, or whether the present case concerns the lawfulness of a particular exercise of the power within its legal limits. That question is closely related to the identification of the standard by reference to which the lawfulness of the Prime Minister's advice is to be judged."

[26] Section 20 of the 2010 Act establishes a procedure for the ratification of treaties which requires that they should be laid before Parliament in order to ensure that either House can consider that the treaty should not be ratified. There is, therefore, a statutory procedural limit on the exercise of the prerogative power to ratify treaties. That provision was expressly disapplied by section 32 of the EUWAA in respect of the withdrawal agreement. Parliament, therefore, decided that no further scrutiny was required before the Prime Minister was entitled to sign and ratify the withdrawal agreement.

[27] We accept, however, that there were legal limits to the exercise of the power in this case. In particular the context of the disapplication of section 20 of the 2010 establishes that the Prime Minister was only permitted to sign the withdrawal agreement which was before Parliament. If there was any change to or modification of the terms of the agreement there would have to have been compliance with the provisions of section 20 of the 2010 Act.

[28] We do not accept that there is any legal limit to the power to ratify the treaty established by the promises contained in the Conservative manifesto. Such promises do not give rise to any legitimate expectation in law and issues in relation to them are managed in the political rather than the legal process. As Lord Bingham explained at paragraph 29 of A v Secretary of State for the Home Department [2005] 1 AC 68:

> "The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions."

[29] The appellant submits that the mind-set of the Prime Minister at the time that he signed the agreement is also a limitation on the exercise of the power. This is characterised as an abuse of power by the appellant and seems more readily to be addressed as an argument related to the exercise of the power within its legal limit.

[30] The trigger for the commencement of these proceedings was the indication that the Bill with the provisions set out at para [10] above was going to be introduced, its subsequent introduction and the suggestion that further statutory measures of a similar kind may be introduced. The Secretary of State accepted that the provisions within the Bill would constitute a breach of international law. They would not, of course, constitute a breach of domestic law if enacted by Parliament.

[31] Parliamentary sovereignty is expressly restated in section 38 of the EUWAA. There is no legal basis in domestic law for the prohibition of the introduction of a proposal for legislation in Parliament which may be contrary to the United Kingdom's international treaty obligations. It is a matter for Parliament to decide whether to adopt the proposal and whether or not the proposal is accepted there is no basis for contending that the introduction of the proposal frustrates the will of Parliament.

[32] To impose a condition on the exercise of the power to ratify a treaty by the Prime Minister that he must not hold the view that Parliament should legislate contrary to any term of the treaty or that the Prime Minister should make full disclosure of such a view, if he held it, before ratifying the treaty constitutes a direct interference with the constitutional right of a member of Parliament to raise matters in Parliament at a time and in circumstances of their choosing. There is no proper basis for inferring that such a limitation should be imposed on the exercise of the prerogative power to ratify any treaty by any Minister.

[33] The claim that there was an abuse of power was the indication that the government was proposing to Parliament a change in the law which would have breached the treaty. At its height it is contended that the Prime Minister always intended to bring forward such a proposal. For the reasons given we do not consider that even if that contention was made good that could constitute a limitation on the exercise of the prerogative power.

[34] For the same reasons we do not consider that such a contention gives rise to any basis for calling into question the exercise of the power within its limits. To do so would necessarily involve interfering with the freedom of any parliamentarian to bring forward at such time as they chose any proposal. That applies as much to government Ministers as to other members of Parliament.

[35] Accordingly, we do not consider that the introduction of the relevant clauses of the Bill and the public discussion around them provided any support for the contention that the Prime Minister had behaved unlawfully. There was no trigger for the commencement of these proceedings. The application is substantially out of time and raises no legal matter requiring an extension of time.

Conclusion

[36] The renewed application for leave to issue judicial review proceedings is refused as the application is substantially out of time and for the reasons given there is no basis upon which to extend time.